Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
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82-5840

No._____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1982

JOSEPH MILLER,
Petitioner,

-vs-

STATE OF ILLINOIS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, 1ST DISTRICT

Joseph Miller, pro se
Stateville Corr. Ctr.
P.O. Box 112, N-01855
Joliet, IL. 60434

pmg

TABLE OF CONTENTS

Prayer..... 1

Opinion Below..... 1

Jurisdiction..... 1,2

Question Presented..... 2

Constitutional Provisions Involved..... 2

Statement of the Case..... 2,3

Reasons for granting this writ..... 3,14

Conclusion..... 15

Certificate of Service..... 16

Motion to Proceed in Forma Pauperis..... 17

Affidavit..... 18

TABLE OF AUTHORITIES

Black v. Curb, 422 F.2d 656 (7th Cir. 1970)..... 6

Com v. Henderson, 438 A.2d 951 (1981)..... 14

Commonwealth v. Soares, 377 Mass. 461, 387 N.E. 2d 499; cert. denied. 444 U.S. 881 (1979)..... 10,11

Drew v. State, 588 S.W. 562 (Tenn. 1979)..... 14

Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444 (1968). 6,13

Duren v. Missiour, 439 U.S. 357, 99 S.Ct. 664 (1979).... 6,7

Peters v. Kiff, 407 U.S. 493, 92 S.Ct. 2163 (1972)..... 7

People v. Jackson, 69 Ill. 2d 252, 371 N.E. 2d 602 (1977) 9

People v. Lavinder, 102 Ill. App. 3d 622, 430 N.E. 2d 243 (1st Dist. 1981)..... 4,5

People v. Miller, (80-1241) (1st Dist. 1982)..... 4

People v. Payne, 106 Ill. App. 3d 1034, 436 N.E. 2d 1046 (1st Dist. 1982)..... 8,9,13

People v. Teague, 108 Ill. App. 3d 891, 439 N.E. 2d 1066 (1st Dist. 1982)..... 9

People v. Thompson, 79 A.D. 2d 87, 435 N.Y.S. 2d 739 (1981)..... 11

People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748 (1978).. 10,11

Pippin v. State, 151 Ga. App. 225, 259 S.E. 2d 488 (1979) 14

Radford v. State, 348 So. 2d 880 (Ala. App. 1977)..... 14

Smith v. Texas, 311 U.S. 128, 61 S.Ct. 164 (1940)..... 6

State v. Brown, 371 So. 2d 751 (La. 1979)..... 14

State v. Washington, 385 So. 2d 1162 (La. 1979)..... 14

Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824 (1965)..... 8,12,13

Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692 (1975)..... 6,7,13

STATUTES, RULES, AND OTHERS

28 U.S.C., section 1257(3)..... 2

U.S.Const. Amendment 6th..... 2,3,4,6,7 8,13,14

U.S. Const. 14th Amendment..... 2,7,12

Ill. Rev. Stat. (1981), ch. 110A, sec. 23..... 4

California Constitution, Art. I, sec. 16..... 10

Massachusetts Const. Art. 12..... 10

U.S. Supreme Court Rule 33..... 16

U.S. Supreme Court Rule 53..... 17

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ON PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, 1ST DISTRICT

To: The Honorable, The Chief Justice and Associate Justices of the United States Supreme Court:

I.
PRAYER

Joseph Miller, (hereinafter petitioner), acting in propria persona, respectfully prays that a writ of certiorari be issued to review the judgment of the Illinois Appellate Court entered in this proceeding.

II.
OPINION BELOW

The opinion of the Illinois Appellate Court appears in appendix (a), attached herewith. The order of the Illinois Supreme Court denying petitioner's leave to appeal to the Illinois Supreme Court is attached herewith as appendix (b).

III.
JURISDICTION

The opinion and judgment of the Illinois Appellate Court was entered on March 1, 1982, affirming the Circuit Court of Cook County judgment. In this regard, petitioner petitioned for leave to appeal to the Illinois Supreme Court which was denied on October 5, 1982. The jurisdiction of this Court is properly

invoked under 28 U.S.C., section 1257(3), conferring on this Court the authority to review final judgments rendered by the highest court of the State, in this instant, the State of Illinois. Petitioner further submits that this review is taken as a matter of right.

IV.
QUESTION PRESENTED

i.

CERTIORIARI SHOULD BE GRANTED TO RESOLVED THE CONFLICT BETWEEN VARIOUS STATE COURTS AND THE PROSECUTOR'S USE OF THE PEREMPTORY CHALLENGES TO EXCLUDE BLACKS FROM JURY SERVICE VIOLATES PETITIONER'S SIXTH AMENDMENT RIGHT TO A JURY DRAWN FROM A CROSS-SECTION OF THE COMMUNITY.

V.
CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States privides in pertient part: "In all criminal prosecution, the accused shall enjoy the right to a. . . . . trial by an impartial jury of the State and district wherein the crime shall have been committed. . . ."

The Fourteenth Amendment to the United States Constitution provides, in part: ". . . . Nor shall any State deprive any person of life liberty, or property without due process of law. . ."

VI.
STATEMENT OF THE CASE

Petitioner was convicted of murder, attempt armed robbery and armed violence predicated on the robbery. During jury selection, defense counsel's objection to the State's repeated use of peremptory challenges to exclude black people were overruled. All of the Blacks were excused and the petitioner proceeded to trial before an all white jury. (Tr. 50,51,137)

On May 29, 1978, the deceased, William Starcy was found shot to death in his car. The State presented two witnesses who testified that on that date they spoke to petitioner, he all-

egedly told them that he had shot a man in a car. (Tr. 528,561, 591,621) The petitioner was arrested on June 13, 1978 and after a lengthy interrogation, gave an inculpatory statement to the police and to an Assistant State's Attorney which was introduced at trial as People Exhibit No. 11. (Tr. 407,08) At pre-trial hearing, the State was allowed to use the statement itself as proof of the voluntary nature of the statement.

At the close of the evidence, the jury was instructed and retired for deliberations. (Tr. 996,1021,1023) During this deliberation, they sent a note to the judge asking if the petitioner could be found guilty on less than all three charges. (Tr. 1024, 25) The trial judge referred them to original instructions. (Tr. 1024,1028, C. 1231) After further deliberation, verdicts of guilty were returned and a judgment was entered on the charges. (Tr. 1029, 1032,1033)

A hearing was held on petitioner's post-trial motions, followed by sentencing hearing. (Tr. 1043,45) The court sentenced petitioner to concurrent terms of thirty-five years for murder, thirty years for armed violence, and fifteen years for attempt armed robbery. (Tr. 1048,1054) On appeal, the Appellate Court in an unpublished opinion vacated petitioner's attempt armed robbery conviction. However, the court felt that petitioner was not denied a fair and impartial jury by the prosecutor deliberately excluding Blacks from the jury.

VII.

REASONS FOR GRANTING THIS WRIT

Certiorari should be granted to resolve the conflict between various state courts and the prosecutor's use of the peremptory challenges to exclude Blacks from jury service which violates a defendant's Sixth Amendment right to a jury drawn from a cross-section of the community.

The primary issue on this appeal is whether petitioner's right to a trial by an impartial jury, as defined by our State and Federal Constitution, was violated by virtue of the prosecutor's unquestioned use of all of the substantial number of peremptory challenges exercised by him to exclude black prospective jurors from the jury service. Additionally, this Court must also resolve, whether the petitioner has a Sixth Amendment entitlement to a fair and impartial jury, especially in this event, where no less then fourteen black persons were deliberately excluded from this jury trial, which was contingent upon the racial motivation by the prosecutor.

In this sense, the Appellate Court upon review disposed of this case under local rule 23[1/] in holding that the petitioner had not set forth a prima facie case of systematic exclusion. The Opinion not only conflicts with two recent decisions rendered by the same First District Appellate Court, but what's equally important is that the conflict exists between various state court decisions.

In People v. Miller, (80-1241) (1st Dist. 1982) (opinion unpublished), the court gave no logical rationale whatsoever as to why petitioner had not presented a prima facie case. The court in affirming petitioner's conviction merely stated, "[t]he trial court did not find the state was exercising its peremptory challenges improperly and, on this record, we cannot say that the trial court abused its discretion." (Slip Opin., at p. 9). Accord, to People v. Lavinder, 102 Ill. App. 3d 622, 430 N.E. 2d 243 (1st Dist. 19781) (Johnson J., dissenting).

The Lavinder Court was the same division that affirmed petitioner's conviction, but even there, Lavinder, can be looked upon in several different aspects: 1) there were only six Blacks on the panel that were peremptorily excluded by the pro-

1/ See, Ill. Rev. Stat., (1981), ch. 110A, section 23.

secutor; 2) the prosecutor only used six peremptory challenges to exclude Blacks; and 3) the prosecutor did not admit unlike in the instant case that he had deliberately used his peremptory challenges to exclude Blacks. Dissimilar to the instant case is the comparative stage to the Lavinder Court, where the prosecutor here, did not deny that racial motivation were behind his excluding all potential Blacks jurors. In particular, when confronted with the ideal that he was excluding Blacks from the jury, the prosecutor merely stated, "[defense counsel] is excluding all whites from the jury." (Tr. 136).

Inconsistent was another determining factor here, especially in light of the fact that Mr. Justice Johnson who set on the court in reaching an affirmative in the instant case, but nonetheless Mr. Justice Johnson dissented in Lavinder, supra, holding inter alia, that the defendant had presented a prima facie case. This Court, thus must be also mindful that the court in Lavinder, was faced primarily with a lesser degree of exclusion then what actually occurred in the instant case.

It is clear from the voir dire that Blacks were excluded solely on the basis of race. Individually they represented a broad cross-section of the community in which they varies in ages and backgrounds. However, a clear prima facie showing that racial motivation was behind the prosecutor excluding various jurors was evident comparatively speaking because the individual Black prospective jurors that were excused, in comparison with the whites that were excepted by the prosecutor as trier of fact showed no more qualifying factor then those Blacks excluded.

In fact, in the case of some potential jurors, the distinction between those excused by the prosecutor, and those who utlimately served as juros are mystifying. The following ex-

ample is illustrated.

William Nicholsen sat as a juror in this case. His voir dire revealed that he lived with his mother near Clark and Addison. He worked as an order filler for a printing company. Ten years earlier he had been robbed in the Loop although no one was arrested. He never sat on a jury before and was never in the miltary. (Tr. 295,97,301,03)

His responses were quite similar to those of Mr. Thomas Wellesby (whom was Black) who also lived with his mother. He was a truck driver like Mr. Nicholsen he had never sat on a jury nor served in the military. (Tr. 162,63) Other than race, it is difficult to discern what motivated the State to exclude Mr. Wellesby yet accept Mr. Nicholsen.

It is undisputed that a criminal defendant is guaranteed an impartial jury by the Sixth Amendment and by principles of due process. Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444 (1968). Since the Sixth Amendment has been interpreted to guarantee a defendant to an impartial jury, it is required that the jury be drawn from a fair cross-section of the community. Smith v. Texas, 311 U.S. 128,130, 61 S.Ct. 164,65 (1940). A jury from which certain group of people have been excluded does not represent a fair cross-section of the community, and any defendant appearing before such a jury has been denied a fundamental right secured by the Constitution. Taylor v. Louisiana, 419 U.S. 522, 26,28, 95 S.Ct. 692,95,97 (1975). Thus, when the State systematically exclude Blacks, whom essentially constitute a sizeable part of the population is violative of the equal protection clause. See, Black v. Curb, 422 F.2d 656 (5th Cir. 1970). The standard by which jury selection procedure are to be judged vary somewhat depending on whether the procedure is challenged under the Sixth Amendment or equal protection. As stated by this Court in Duren v. Missiour, 439 U.S. 357, 99 S.Ct. 664 (1979), the elements of prima facie violation of the Sixth Amendment are:

> 1) that the group alleged to be excluded is a "distinctive" group in the community; 2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and 3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. Id., at 364.

The law is clear that a showing of substantial underrepresentation of a cognizable class can establish a prima facie case of discriminatory selection of jurors.

Thus, in Taylor, supra, this Court had before it a Louisiana jury-selection system which did not disqualify woman from jury service but permitted them to decline. As a result, only a few females, a number grossly disproportionate to the number of eligible women in the community, were called for jury service. This Court held that the petitioner (a male) was deprived of his Sixth and Fourteenth Amendment rights to an impartial jury trial by the exclusion of woman jurors. The essential purpose of the fair cross-section requirement is to assure both the "diffused impartiality" of a jury drawn from a broad representative poll and "community participation in the administration of the criminal law." Taylor, supra. 419 U.S., at 530,31.

The fair cross-section right extends to defendant's the opportunity to have a jury whose members reflect the "qualities of human nature and varites for human experience, the range of which is unknown and perhaps unknowable." Peters v. Kiff, 407 U.S. 493,503,04, 92 S.Ct. 2163,69 (1972).

Finally, petitioner submits that the purpose of a fair cross-section protection is to provide a criminal defendant with a jury which are microcosms of the community. In this event, the Sixth Amendment right to an impartial jury is given

full effect by insuring that distinct groups of the community are represented, but equally important, are not given the opportunity to dominate, or, in the alternative, deny the opportunity to participate in a democratic system of justice.

Additionally, petitioner submits that the inherent procedure enunciated in Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824 (1965), that is being utilized in Illinois is not an accurate guide in which to determine whether the state prosecutor is using his peremptory challenges to exclude individual from performing jury service. See, e.g., People v. Payne, 106 Ill. App. 3d 1034, 436 N.E. 2d 1046,1051 (1st Dist. 1982). There, the Appellate Court First District held that the State's systematic exclusion of prospective jurors solely because of their race is invidious and unconstitutional at any stage of the jury selection, i.e., from the time the general jury list is prepared by the jury commissioner until the jury is actually selected and sworn. Id., 106 Ill. App. 3d at 1036,37, 436 N.E. 2d at 1048. The court based it's decision in Payne, on a defendant's right to an impartial jury under the Sixth Amendment and upon the roles of the State, the prosecutor and the Court itself in a criminal trial. The court in concluding held that even though the prosecutor had deliberately left remaining one black juror on the venire, it was still visibly evident that the jury was so deleted of a fair cross-section of the community that the Sixth Amendment was in facto being violated at this point. The court rejected the State's argument that the jury was fairly represented:

> "The State also argues that because one Black was seated on the jury the State did not affirmatively deny defendant a fair cross-section of the community on the jury. This argument is unavailing because this case involves the exclusion of all the Black jurors by the State before the last available Black was allowed to be seated as a juror is no less evil and no

> less constitutionally prohibited than the same procedure which results in the total exclusion of Blacks. We are not unmindful that some attorneys may leave a token Black on the jury after they are assured that there are no more Blacks available to be seated. This type of practice does not lessen the unconstitutionality of the State's initial exclusion of Blacks from the jury soley because they were Blacks." Id. 106 Ill. App. 3d at 1045, 436 N.E. 2d at 1054.

The Appellate Court, First District were recently again confronted with the issue of jury discrimination by one of its sub-divisions. See, People v. Teague, 108 Ill. App. 3d 891, 439 N.E. 2d 1066 (1982), which rejected the rationale used by the Payne Court. The reasons for the rejection was for three basic reasons: 1) that the court thought that "a defendant is [not] constitutionally entitled to a petit jury that is as near an approximation of the ideal cross-section of the community as the process of random draw and constitutionally acceptable procedures permit." Id. 108 Ill. App. 3d at 896; 2) the court next rejected Payne, supra, predicated upon the fact that, "the State under the circumstances there posited has to show a basis for its peremptory challenges, then the peremptory challenges has been so effectively emasculated as to destroy it function . . . ." Teague, Id., at 897, and 3) finally the court rejected the Payne, decision insofar as, ". . . . if the law in Illinois is to be the abolition of peremptory challenges as enunciated in Payne, the problem should be met forthrightly by the Legislature[2] by abolishing peremptory challenges to make all challenges to make all challenges challenges for cause and place their exercise in the discretion of the trial judge." Teague, Id., at 897.

Adjunctively, the various conflicts in Illinois courts

2/ In People v. Jackson, 69 Ill. 2d 252, 371 N.E. 2d 602 (1977), held that "[i]f the power is judicial in character, the legislature is expressly prohibited from exercising it." Id., at 254.

in enunicating whether vel non the prosecutor had used its peremptory challenges to strike Blacks from the jury has been inconsistent and in direct conflict with other state courts. Compare, e.g., People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748 (1978), where the California Supreme Court reversed convictions of two black defendants, where no inquiry was made by the trial court into the prosecutor's reasons for his use of peremptory challenges to exclude blacks from the jury. The court concluded that "the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community under Article I, section 16, of the California Constitution." 583 P.2d at 761,62. The court in Wheeler, also found reversible error in the failure of the trial court to ascertain whether the prosecutor had been motivated solely by their perceived "group bias" in peremptorily challenging blacks, where the defendants had made out a prima facie case that the prosecutor had been so motivated.3/

Similarly, in Commonwealth v. Soares, 377 Mass. 461, 387 N.E. 2d 499; cert. denied, 444 U.S. 881 (1979), the Supreme Judicial Court of Massachusetts held that Article 12 of the Declaration of rights of the Massachusetts Constitution proscribes "the use of peremptory challenges to exclude prospective jurors solely by virtue of their membership in, or affiliation with particular defined groupings in the community." 387 N.E. 2d at 515. Accordingly, the court held it was error for the trial court to have failed to inquire into the reasons for the prosecutor's use of peremptory challenges against Blacks, where the prosecutor used 12 of the 44 permptory challenges exercised by him to exclude Blacks, with the result that only one Black, who was unchallenged sat on the Black defendants jury. Inquiry was required because

3/ The Wheeler Court did not reveal the precise number of Blacks excluded by the prosecutor by peremptory challenges.

a prima facie case of impermissilbe exclusion solely because of race had been made out by the prosecutor having peremptorily challenged 92 percent of the black prospective jurors as opposed to 34 percent of the "available whites". 387 N.E. 2d at 517.

But even the courts in Soares and Wheeler, supra, have held that a defendant asserting a systematic exclusion, must makes a complete record and set forth in prima facie case of discrimination during jury selection. To the contrary, in People v. Thompson, 79 A.D. 2d 87, 435 N.Y.S. 2d 739 (1981) (Titone & Mangand JJ., dissenting). The court there even went to the extent to reverse that defendant's conviction, "recogni[zed]. . . the importance of the assurance of 'diffused impartiality' may be required by the very language of our State Constitution, which mandates that no person shall be deprived of right 'unless by the law of the land, or the judgment of his peers,'" Id., at 750. Therefore, "[i]t is apparent that the unfettered use of the peremptory challenges on the basis of race may, in and of itself, ultimately defeat the defendant's right to trial by a jury drawn from a fair cross-section of the community, even though the venire and panel may have been selected in a manner consistent with that right." Id., at 752.

The court in Thompson, not agreeing in its entirety that the sole motivation by the prosecutor use of the peremptory challenges were racial, the court nevertheless proclaimed that it was the trial court's duty to at least make an attempt to inquire as to what the prosecutors intentions were. Additionally, in Thompson, the court held that the failure for the trial court to make an inquiry was error. Id., at 755.

The significant questions regarding the method by which juries are selected in Illinois, and the implementation of con-

stitutional safeguards must be addressed by this Court. The plethora of litigation pending on this very issue is a sufficient indication by the widespread confusion generated by the conflict of authority within Illinois, in other jurisdictions, and the inadequacy of the test enunicated in Swain v. Alabama, supra, where the State prosecutor used what were in effect peremptory challenges to exclude all six blacks prospective jurors from the jury that was to try the black defendant. This Court rejected defendant's claim that this action violated his right under the Equal protection clause of the Fourteenth Amendment to the Federal Constitution. After examining the "very old credential" of peremptory challenges and noting that they are often exercised "on grounds normally though irrelevant to legal proceedings or official action, namely the race, religion, nationality, occupation or affiliations of people summoned for jury duty." Id., at 220. This Court concluded:

> "In the light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institutional of jury trial, we cannot hold that the constitution requires an examination of the prosecutor's reasons an examination of the prosecutor's reasons for exercise of his challenges in any given case. The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is over and the prosecutor therefore subjected to examination by allegations that in the case at hand all negroes were removed from the jury or that they were removed because they were negroes. Any other result, we think, would establish a rule wholly at odds with the peremptory challenges system as we know it." Id., at 222.

Petitioner submits however, that the standards articulated in Swain, supra, does not adequately protects a defendant's right to a petit jury selected from a fair cross-section of the community. Additionally, if Swain, supra, was before this Court now on certiorari, inescapably this Court would be compelled to re-

verse the Swain case, especially in light of the recent decisions that have been decided after Swain, which strongly criticize the insurmountable guidelines established by that court. "It has been almost 18 years since Swain was decided. During that time two cases have been decided by [this court] which we believe cause the present case and similar cases to be distinguished from Swain." People v. Payne, supra, 436 N.E. 2d at 1051. In 1968, this Court held, for the first time, that the 6th Amendment of the Constitution of the United States as it relates to jury trials applies to states criminal trials. Duncan, supra. Seven years later, the court decided Taylor v. Louisiana, supra. In Taylor, the court stated: "The background against which this case must be decided includes our holding in Duncan, that the Sixth Amendment provision for jury trial is made binding on the States." Id., at 526.

". . . . Duncan and Taylor, together have significantly changed the law from the time Swain, was decided vis-a-vis the 6th Amendment right of an accused in a State trial to a jury drawn from a fair cross-section of the community and the prohibition of the State's affirmative frustration of that right." Payne, 106 Ill. App. 3d at 1041, 436 N.E. 2d at 1052. At the time Swain, was decided the 6th Amendment had not yet been recognized as applicable to State criminal trials and the accused's 6th Amendment right to a jury drawn from a fair cross-section of the community and the prohibition of the State's affirmative frustration of that right were neither raised nor discussed in Swain. Id.

Moreover, even looking at Swain in retrospect, when the court said, "[I]n these circumstances, giving even the widest leeway to the operation of irrational but trial-related suspicions and antagonisms, it would appear that the purpose of the peremptory challege are being perverted. If the State has not seen fit to leave a single Negro on any jury in a criminal

case, the presumption protecting the prosecutor may well be overcome." Id., 223,24, those findings could very well be applied here, insofar as, the prosecutor did in fact exclude every Black person on the panel. Therefore, in this regard, petitioner has effectually met and surpass this part of the Swain test.

Thus given the situations in each of the above cited cases, different circumstances resulting in each, however, those cases the defendants were tried in other jurisdictions[5] nevertheless that does not preclude this Court from interventing and reversing the petitioner's conviction, insofar as, here, the petitioner has made a clear showing of a prima facie case, a deliberate exclusion and equally important, through a Sixth Amendment entitlement all three elements have been fulfulled in the case at bar, whereas in the above cited cases, there was no substantial likelihood that the defendants could possibly have set forth a case of purposeful exclusion like the case at bar. But, even more so, the court in Thompson, supra, reversed the defendant conviction even though there was no disproportinate amount of jurors excluded over a extended period of time.

5/ See, e.g., Pippin v. State, 151 Ga. App. 225, 259 S.E. 2d 488 (1979), where the prosecutor used five of his ten peremptory challenges and the court held that defendant had not stated a prima facie case. However, compare, State v. Brown, 371 So. 2d 751 (La. 1979); State v. Washington, 385 So. 2d 1162 (La. 1979), the Louisiana Supreme Court ruled that systematic exclusion had been proven under Swain. Radford v. State, 348 So. 2d 880 (Ala. App. 1977), where out 27 prospective jurors, only 6 were blacks the court held without any logicial rationale that "appellant was not denied any of his constitutional right (state or federal) by the prosecutor stricking all six blacks from the venire." Id., at 882. See, also Com v. Henderson, 438 A.2d 951 (1981) (Nix J., dissenting) "Is justice to sit supinely by and be flaunted in case after case before a remedy is available? Is justice only obtainable after repeated injustices are demonstrated? Is there any justification within the traditions of the Anglo-Saxon legal philosophy that permits the use of presumption to hide the existence of an obvious fact?" 438 A.2d at 961. The majority in Henderson, had erroneously held that, "/n/either the jury role nor the venire need be a perfect mirror of the community or accurately reflect the proportionate strength of every identificable group." Id., at 953. Finally, Drew v. State, 588 S.W. 2d 562 (Tenn. 1979). The court there sporadic evaluation of the prosecutor use of the peremptory challenge. The court was primarily sub silento on the issue of the jury discrimination.

C O N C L U S I O N

For the foregoing reasons, petitioner Joseph Miller respectfully requests that a writ of certiorari be issued to review the judgment of the Illinois Appellate Court.

Respectfully Submitted,

Joseph Miller

Joseph Miller, pro se
Stateville Corr. Ctr.
P.O. Box 112, N-01855
Joliet, IL. 60434

No._____
In The
SUPREME COURT OF THE UNITED STATES
October Term, 1982

JOSEPH MILLER,
Petitioner,

-vs-

STATE OF ILLINOIS,
Respondent.

CERTIFICATE OF SERVICE

To: Alexander L. Stevas, Clerk
U.S. Supreme Court
Supreme Court Bldg.
Washington, D.C. 20543

Mr. Richard M. Daley
State's Attorney
#500 Richard J. Daley Ctr.
Chicago, IL. 60602

Mr. Tyrone C. Fahner
Attorney General
#188 W. Randolph Street
Chicago, IL. 60601

1. Pursuant to Rule 33 of the Rules of the Supreme Court of the United States, I personally forwarded the attached petitioners upon the above indicated parties--- this by personally forwarding these petitions before the undersigned Notary Public with agreement to delivery through the United States Mail.

2. I, Joseph Miller, being first duly sworn upon oath, deposes and avers that the above indications are true and correct.

Joseph Miller
Affiant: Joseph Miller, N-01855
Stateville Corr. Ctr.
P.O. Box 112
Joliet, IL. 60434

SUBSCRIBED AND SWORN TO BEFORE ME
THIS 1 DAY OF Dec, 1982
David E Emerson
NOTARY PUBLIC
MY COMMISSION EXPIRES aug 22, 1983

No._____
In The
SUPREME COURT OF THE UNITED STATES
October Term, 1982

JOSEPH MILLER,
Petitioner,

-vs-

STATE OF ILLINOIS,
Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Joseph Miller, (hereinafter petitioner), asks leave to file a petition for a writ of certiorari to the United States Supreme Court without prepayment of cost and to proceed in forma pauperis pursuant to Rule 53 of this Court.

Petitioner's affidavit in support of this motion is attached hereto.

Respectfully Submitted,

Joseph Miller

Joseph Miller, pro se
Stateville Corr. Ctr.
P.O. Box 112, N-01855
Joliet, IL. 60434

STATE OF ILLINOIS)
) SS
COUNTY OF W I L L)

AFFIDAVIT

I, Joseph Miller, being first duly sworn and states:

1. I am the affiant in the above-entitle cause.

2. I submit this affidavit in support of my motion for leave to proceed in forma pauperis before this court.

3. Because of my poverty I am unable to pay the cost of said proceeding.

4. I am unable to give security for the same.

5. I believe that I am entitle to the redress I seek in said proceeding.

6. The nature of said proceeding and the issues involved are set forth in the petition for writ of certiorari.

WHEREFORE, Affiant have signed the contents thereof, and state that the facts contained therein are true and correct.

Joseph Miller
Affiant: Joseph Miller, N-01855

SUBSCRIBED AND SWORN TO BEFORE ME
THIS 1 DAY OF Dec, 1982
David E Evangelis
NOTARY PUBLIC
MY COMMISSION EXPIRES, aug 22, 1983

NOTICE

The text of this opinion may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

FOURTH DIVISION
MARCH 11, 1982

80-1241

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	Appeal from the Circuit Court of Cook County.
vs.	)	Honorable Frank B. Machala, Judge Presiding.
JOSEPH MILLER, Defendant-Appellant.	)	

ORDER DISPOSING OF APPEAL
UNDER SUPREME COURT RULE 23

Defendant was charged with 3 counts of murder, with attempted armed robbery and with armed violence based on attempted armed robbery. (Ill. Rev. Stat. 1977, ch. 38, pars. 9-1, 8-4, 33A-2.) Following a jury trial, defendant was convicted of murder, attempted armed robbery and armed violence and was sentenced to 35 years in the penitentiary for murder, 15 years for attempt and 30 years for armed violence. On appeal, defendant contends: (1) the trial court improperly considered the contents of his statement as evidence of its voluntariness before determining that it was voluntary, (2) the trial court abused its discretion in failing to respond directly to the jury's inquiry whether they had to find him guilty or not on all 3 charges, (3) the prosecution's closing argument denied him a fair trial because the prosecutors placed their personal integrity behind the testimony of the State's witnesses, (4) the conviction and

Dep. A.

sentence for armed violence must be vacated since it is an improper double enhancement of the offense of attempted armed robbery, and (5) he was denied trial by a fair and impartial jury and due process by the State's use of its peremptory challenges in such a manner as to exclude 14 black potential jurors.

At approximately 5 a.m. on May 29, 1978, Chicago Police Officer Stan Szczesny responded to a radio call and discovered the body of deceased, a white male, slumped over the console of a Corvette automobile. The front of the Corvette, which was a good distance from the sidewalk, was in contact with and slightly underneath the rear bumper of a van parked at the sidewalk. The driver's side window was down. The victim had $72.86 and his wallet. When ambulance attendants arrived, he was able to observe a puncture wound in the right chest of the victim.

Gail Hood testified that at approximately 2 a.m. on May 29, 1978, she was with 2 friends, Venzoria Barber and Denise Robinson. Defendant, who was out of breath, ran up to their car, which was parked near 64th and Bell, a short distance from where deceased's body was subsequently discovered. Defendant explained he had a woman pose as a prostitute and get into the deceased's car on Claremont. Then defendant appeared and pointed a gun into the car on the driver's side. The victim then tried to grab the gun and it went off. This witness testified she saw defendant several times thereafter and each time defendant asked her if she thought any of the persons present that night would speak to the police.

Venzoria Barber corroborated Gail Hood's testimony. She recalled that defendant had said he had shot a white man in a Corvette on Western

Avenue and thought he was a policeman. Defendant said that he and his "prostitute" were planning to rob a man but something went wrong and he had to shoot him. Defendant expressed the hope the girl who was with him got away because she might tell police, and he would probably go to prison.

Chicago Police Officer Thomas Quinn testified he arrested defendant at 6503 South Claremont, which is about one block from where the deceased's body was discovered. He advised defendant of his constitutional rights, and defendant said he understood them. He transported defendant to the police station where he again advised defendant of his constitutional rights and defendant repeated his understanding of them.

Assistant State's Attorney James Davidson testified that at approximately 5:30 a.m. on June 13, 1978, Investigator Ptak telephoned him. He went to the police station, and, when he told defendant he was going to advise him of his constitutional rights, defendant said he knew them, but wanted to speak to his mother first. Defendant then enumerated his rights to the assistant State's Attorney. After defendant met with his mother, Davidson again told defendant he was going to advise him of his rights, but defendant said that he did not have to because he understood them. Defendant then gave an oral statement. Beginning at 11:04 a.m., defendant gave a written statement which was taken down by an official court reporter. After the statement was transcribed, defendant signed it. In this statement, defendant stated he was 20 years of age and attended the Prairie House Drug Abuse Program. A girl, whose name he did not wish to reveal, and he had planned to rob a man to get

money. The man, deceased, was white and driving a 1975 Corvette. After the girl got into the car on the passenger side, he reached over into the car and announced a robbery from the passenger side of the vehicle. He pointed a .38-caliber gun at deceased, who then started the car. When defendant pushed the car's transmission into a park position, the gun went off. Deceased then started the car, backed up and drove off with the girl still inside.

Michelle Kalekar, a pathologist, performed an autopsy on deceased May 29, 1978. In this physician's opinion, the cause of death was a gunshot wound of the right chest. Gunpowder deposits were noted on the victim's shirt and a .38-caliber bullet was recovered from the body.

Defendant argues the trial court should not have considered portions of his statement prior to making a determination that it was voluntary. The contents of a statement may be considered, not to determine the truth of the facts set forth in the statement, but as a circumstance bearing on the voluntary nature of the statement. (People v. Hudson (1970), 46 Ill. 2d 177, 195, 263 N.E.2d 473.) The trial court committed no error in this regard.

Defendant's next contention concerns how the jury should have been instructed after it sent the court a note which stated:

> "Can the defendant be found guilty on one or two counts out of three or must it be of all three counts?"

The court explained to the parties that, if it started to answer more specifically, it might appear to be condoning a guilty verdict and

instructed the jury:

> "You have received your instructions and verdict forms.
>
> Continue to deliberate."

Defendant contends this instruction did not adequately inform the jury of its options, that there was a reasonable basis for the jury's confusion, and the jury's inquiry expressed doubt concerning a crucial matter of law which the court was required to clarify. (People v. Morris (1980), 81 Ill. App. 3d 288, 290, 401 N.E.2d 284.) The State responds that the instructions were clear and there was no duty on the part of the court to make any clarification. (People v. Bostado (1981), 92 Ill. App. 3d 837, 839, 416 N.E.2d 353.) We agree with the trial court that the question put by the jury was ambiguous and that the jury had been properly instructed. The jury was instructed:

> "You will be provided with six forms of verdict. When you have unanimously agreed upon your verdicts you will select the forms which reflect your verdicts and sign them as I have stated."

The 6 verdict forms allowed the jury to find the defendant either guilty or not guilty of murder, either guilty or not guilty of attempted armed robbery, and either guilty or not guilty of armed violence. In our opinion there was no basis for the jury's confusion, and the trial court did not abuse its discretion by informing the jury it had already received its instructions and it should continue to deliberate. The jury

was properly instructed with respect to the forms of verdict. We find no abuse of discretion in the trial judge's actions in dealing with the jury's request. People v. Jedlicka (1980), 84 Ill. App. 3d 483, 491-92, 405 N.E.2d 844.

Defendant next contends he was denied a fair trial because the prosecutors injected their personal integrity as an issue in the case. Defendant complains of the following comments:

> "Did you think that Mark Rakoczy [assistant State's Attorney] and myself got together with Venzoria Barber and told her what to say? Did anyone of you twelve think that Venzoria Barber had the ability to remember things that I or Mr. Rakoczy might have told her to say?
>
> In reference to the homicide investigator, Ptak could care less. He only wanted to find the man responsible for this murder. . . . and another point, if Ptak is framing the guy, then Rakoczy and I have to be in on it too, because it just couldn't end with the police. They would have to come to me and say, Greg, you know, here is the story. We are framing this guy and we have to work this thing out. We have got to get this whole thing together.
>
> Well, that being the case, do you think that Mr. Rakoczy and I get a raise if this man is convicted?"

The State contends this argument was merely a fair response to arguments by the defense. We consider the remarks improper and not a fair response to the defendant's closing argument, which merely attacked the credibility of the State's witnesses, but we conclude that defendant has waived any error concerning this argument by failure to object at trial or to raise this error in the written post-trial motion. If a timely objection had been made at trial, the court, by sustaining the objection or instructing the jury to disregard the comments, could have corrected the error. (People v. Carlson (1980), 79 Ill. 2d 564, 577, 404 N.E.2d 233.) Despite the lack of objection, if the trial error is so prejudicial that real justice has been denied or the verdict of the jury may have resulted from such error, it may be noticed as plain error under Supreme Court Rule 615(a). (73 Ill. 2d R. 615(a); People v. Carlson, 79 Ill. 2d 564, 577-78.) Since the evidence was not closely balanced, we do not find the plain error doctrine should be invoked. Cf. People v. Pastorino, ___ Ill. 2d ___, ___ N.E.2d ___ (No. 54413, filed February 19, 1982).

Defendant next contends that improper double enhancement occurred when he was convicted and sentenced both for attempted armed robbery as well as armed violence based on attempted armed robbery. Since attempted robbery, without a weapon, is a class 3 felony, the presence of a weapon elevates it to a class 1 felony. Defendant reasons that the armed violence charge predicated on the attempted armed robbery enhances the penalty again, by making the same conduct a class X felony. Defendant cites People v. Haron (1981), 85 Ill. 2d 261, 422 N.E.2d 627, which we

consider not in point because in Haron a misdemeanor was enhanced to a felony and then to a class X felony. Since the attempted armed robbery conviction and the armed violence conviction were based on the same conduct, and since all the elements of attempted armed robbery were contained in the armed violence conviction, under People v. King (1977), 66 Ill. 2d 551, 363 N.E.2d 838, the lesser offense, attempted armed robbery and the sentence imposed thereon, must be vacated. Cf. People v. Burnette (1981), 97 Ill. App. 3d 1015, 1022, 423 N.E.2d 1193.

Finally, defendant contends he was denied due process and a fair trial by jury because the State used all of its peremptory challenges in such a manner as to exclude all 14 black people challenged from serving on the jury. Defendant was a black man, and the victim was a white man. Yet, the State contends, that in order to establish purposeful discrimination, defendant must do more than merely show that blacks were excused from his jury through the prosecution's use of its peremptory challenges. As the supreme court said in People v. Harris (1959), 17 Ill. 2d 446, 450-51, 161 N.E.2d 809, the right of peremptory challenge is a substantial right which may "be exercised or not exercised, according to the judgment, will or caprice of the party entitled thereto."

Although the practice of using the peremptory challenge to strike all blacks from the jury has been condemned, the evidence of purposeful exclusion must be apparent, and it is the responsibility of the trial court to determine whether the State has properly exercised its peremptory challenges. (People v. Smith (1980), 91 Ill. App. 3d 523, 531-32, 414

N.E.2d 1117; cf. People v. Fleming (1980), 91 Ill. App. 3d 99, 413 N.E.2d 1330; People v. Bracey (1981), 93 Ill. App. 3d 864, 417 N.E.2d 1029; People v. LaVinder (1981), 102 Ill. App. 3d 662, ___ N.E.2d ___. In the case at bar, the defense brought its contention to the trial court's attention. The trial court did not find the State was exercising its peremptory challenges improperly and, on this record, we cannot say that the trial court abused its discretion. People v. LaVinder, 102 Ill. App. 3d 662.

The judgment of conviction and the sentence for attempt is vacated; in all other respects, the judgment of the circuit court of Cook County is affirmed.

Dated at Chicago, Illinois, this 11th day of MARCH, 1982.

ENTER:

Justice

Justice

Justice